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VOL. 6

1936 - 1937

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THE ALBANY LAW REVIEW

of

RECENT DECISIONS

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CONSTITUTIONAL LAW - MINIMUM WAGE STANDARDS

COST OF LIVING AND VALUE OF SERVICES

Once more the validity of labor legislation under the due process clause of the Fourteenth Amendment and the doctrine of "liberty of contract" derived therefrom have become a matter of special controversy before the United States Supreme Court. The question was renewed when the Supreme Court recently declared the New York Minimum Wage Law for women and minors unconstitutional by a five-to-four decision in the case of Morehead v. New York ex rel. Tipaldo (80 L.Ed.921, 297 U.S.___).

The New York law provided that whenever a substantial number of women and minors in any occupation were receiving less than a subsistence wage an investigation should be made to determine whether the wages were "oppressive and unreasonable." The Act defined an oppressive and unreasonable wage as one that is both "less than the fair and reasonable value of the services rendered and less than sufficient to meet the minimum cost of living necessary for health." If investigation disclosed that the wages paid were oppressive and unreasonable, the industrial commissioner or the director of the minimum wage division was authorized to appoint a wage board. The commissioner after a recommendation by the wage board, was empowered to fix a minimum "fair" wage (Cf. infra) to be paid in the particular industry and issue a mandatory order requiring the payment of such wages. Any employer failing to comply with such order was guilty of a misdemeanor.

This case in question arose when one Tipaldo who was the manager of a laundry establishment was indicted for a violation of the minimum wage law in paying an adult woman employee a wage less than that set by the industrial commissioner. Through a writ of habeas corpus, Tipaldo sought to test the legality of his arrest and imprisonment. He contended that the New York Minimum Wage Law was invalid as the statute violated the Fourteenth Amendment of the United States Constitution, and Article 1 §6 of the New York State Constitution.

The decision itself has been the subject of much severe criticism from many sources. Public opinion was very much against the court when it handed down its decision. The court was accused of everything from creating a "no man's land" in the field of legislation to the act of setting up a dictatorship based on the personal predilections of a bare majority of its members. For the most part this spontaneous wave of disapproval came from people who never stopped to analyse the nature of the courts decision. This can best be explained in the words of the majority opinion: "The Adkins case, unless distinguishable requires affirmance of the judgment below. The petition for the writ sought review upon the ground that this case is distinguishable from that one. No application has been made for reconsideration of the constitutional question there decided. The validity of the principles upon which that decision rests is not challenged. This court confines itself to the ground upon which the writ was asked or granted. Here the review granted was no broader than that sought by the petitioner. He is not entitled and does not ask to be heard upon the question whether the Adkins case

should be overruled. He maintains that it may be distinguished on the ground that the statutes are vitally dissimilar." (Morehead v. N.Y.ex rel. Tipaldo,supra).

In the last sentence of the above quotation can be seen the chief issue in the case as the court saw it when the case at bar was decided. No one can quarrel with this stand taken by the court as it is a well known fact that the court will not decide questions not required for a proper decision of the particular case in hand. Under the Constitution the Supreme Court does not and cannot give advisory decisions. It can only decide controversies.

The New York State Court of Appeals had construed the statute in such a way that it enbodied substantially the same provision that caused the act in the Adkins case (Cf. infra) to be declared unconstitutional. Chief Justice Crane writing the majority opinion of the Court of Appeals said: "The act of Congress had one standard, the living wage; this State Act has added another, reasonable value. The minimum wage must include both. What was vague before has not been made any clearer. One of the elements, therefore, in fixing the fair wage is the very matter which was the basis of the congressional act." (People ex rel. Tipaldo v. Morehead, 270 N.Y.233). The State in appealing to the Supreme Court contended that the State court had misconstrued the statute but the Supreme Court refused to construe the statute otherwise on the ground that it was without power to put a different construction upon the State enactment from that adopted by the highest court of the State.

Chief Justice Hughes who wrote a dissenting opinion in the case refused to accept the construction of the statute as given by the New York court as binding on the Supreme Court. He wrote: "When the opinion of the State court goes beyond the statement of the provisions of the act, and says that the setting up of such a standard does not create a material distinction when compared with the act of Congress in the Adkins case, the State court is not construing the State statute. It is passing upon the effect of the difference between the two acts from the standpoint of the Federal Constitution." 'Morehead v. N.Y. ex rel. Tipaldo, supra). The Chief Justice contended that the New York statute differed materially from the act of Congress insofar as it forced the payment at a reasonable value and that this difference made the ruling of the Adkins case inapplicable. With this difference in mind the Chief Justice found no difficulty in upholding the statute as a reasonable limitation on liberty of contract.

It seems clear that this matter of difference or sameness in the standards for determining the minimum fair wage set-up in the two acts was the vital issue in the whole case as it came up to the Supreme Court. The petitioner wanted the act to be tested as if it did not include the cost of living and as if value of service was the sole standard. This was plainly an untenable position as the New York Court of Appeals had construed the statute as requiring the commission er to prescribe a wage based on both standards. The statute made as a jurisdictional requirement a finding by the commissioner that oppressive and unreasonable wages were being paid in an industry, viz., wages that were both less than living wages and less than the reasonable value of the services rendered. It defined a fair wage thereupon to be established as one "fairly and reasonably commensurate with the value of the service or class of services rendered." Although the statute did not expressly declare that the amount of a

living wage was to be considered in establishing a minimum fair wage, the New York Court of Appeals construed the prescribed standard to include cost of living. Chief Justice Hughes dissented from this construction. The majority of the court, however, held themselves bound by the construction of the New York court so in considering the decision of the Supreme Court it must be kept in mind that it was based on the construction of the statute as given by the Court of Appeals.

The District of Columbia statute which was held invalid in the Adkins case defined a minimum wage as one adequate "to supply the necessary cost of living to women workers" and "to maintain them in health and to protect their morals." (40 Stat. at L. 963 chap.174). The standard there set up disregarded the reasonable value of the services entirely. In regard to that standard Justice Sutherland wrote in the majority opinion: "A statute requiring an employer to pay in money, to pay at prescribed and regular intervals, to pay the value of the service rendered, even to pay with fair relation to the extent of the benefit obtained from the service, would be understandable. But a statute which prescribes payment without regard to any of these things and with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States." (Adkins v. Childrens Hospital, 261 U.S. 525, 559). It was with this in mind that the framers of the New York statute labored and for this reason they drafted the Act so that it set up "reasonable value" as one of the standards by which the minimum wage should be determined.

It could rightfully be inferred from what Justice Sutherland said in his opinion, that there were two possible standards for determining a minimum wage that might be upheld - one, that required a payment of the reasonable value, and, the other, that required payment in fair relation to reasonable value. Payment under the former is limited by the value of the services rendered, while the latter does not exclude the possibility of a compulsory exaction of a living wage, although it exceeds the reasonable value. Cf. Adkins case at p.557. The New York statute made use of the first standard, reasonable value, when it set up its jurisdictional requirement by defining an unreasonable and oppressive wage. In that part of the Act it was provided that if a wage was being paid that corresponded to reasonable value of the services rendered although less than necessary to meet the cost of living, the commissioner would have no authority to go ahead and establish a minimum "fair" wage. Then when one looks at the administrative part of the Act as construed by the court there is to be found the second standard that was suggested by Justice Sutherland, viz., payment in fair relation to reasonable value. It can be said that standard is there because the Act was construed as requiring the use of the living wage standard along with that of reasonable value in the establishing of a minimum wage. The New York statute was admittedly carefully drawn with the avowed purpose of avoiding the constitutional objection that had caused the statute in the Adkins case to be declared invalid. The District Act had made no provision for the minimum wage conforming to the reasonable value of the services rendered; the New York Act expressly made this provision and it was this distinguishing feature of the Act that its supporters relied upon as making it essentially different from the prior act so that the Adkins case would not control this case.

The court found otherwise and it seems that it was logically justified in refusing to uphold the distinction put forth by the State in its efforts to uphold the statute, remembering that the court was bound by the construction put upon the statute by the Court of Appeals, wherein the Court of Appeals in construing the statute said that a minimum wage must include both staheards, viz., "reasonable value" and "living wage." True the statute required a minimum wage to conform to the reasonable value of the services rendered but it just as emphatically required the wage to be a "living wage." It was this latter standard that the court in the Adkins case specifically condemned. There it said: "The feature of this statute which, perhaps more than any other, puts upon it the stamp of invalidity is that it exacts from the employer an arbitrary payment for a purpose and upon a basis having no causal connection with his business, or the contract, or the employee engages to do. The declared basis, as already pointed out, is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health and morals." (Adkins case, supra, at p.558). Insofar as the New York Act set up "reasonable value" as a standard it was distinguished from the invalid act but when it set up "living wage" as an equally controlling standard it coincided absolutely with the prior act. There was a difference as there had been an addition to the standard for determining the minimum wage but, nevertheless, the old objectionable standard still remained. Perhaps the old objection was somewhat hidden or alleviated by the addition of a new standard but it was not removed and its presence could still be felt.

The well established axiom that a chain is no stronger than its weakest link might well apply in this case. The standard set up in the New York statute was a strong, praiseworthy determinant in the equation used for solving a minimum wage but the link of "living wage" was no stronger as a determining factor than it had been in the District Act and the only possible result of its presence was to cast its shadow of invalidity over the whole Act. If it could be assumed that "reasonable value" and "living wage" would always equal each other, the validity of the standard probably would not be questioned but the difiiculty is that there is no guaranty that a "living wage" would never be any greater than the reasonable value of the services rendered. As soon as a "living wage" increased over the reasonable value then to give effect to the "living wage" standard as demanded by the construction of the statute would be to exact from the employer such an arbitrary payment as was condemned by the Adkins case (Cf. 557).

The court did not rest its decision solely on its finding that the Act in question could not be distinguished from the invalid District Act. After deciding that the Adkins case was controlling over the case at bar and citing approvingly excerpts from the opinion in that case, the court went on to say that: "the dominant issue in the Adkins case was wiether Congress had power to establish minimum wages for adult women workers in the District of Columbia. The opinion directly answers in the negative. The ruling that defects in the prescribed standard stamped that Act as arbitrary and invalid, was an additional ground of subordinate consequence." (Morehead v. New York ex rel. Tipaldo, supra). This perhaps was dicta in the case but assuming the Adkins case to be the controlling precedent over the question of minimum wages it might reasonably be inferred from what the court said that the New York statute would have been

declared invalid even though it could have been distinguished from the District Act.

Justice Stone in a strong dissenting opinion expressed his belief that the New York statute should be upheld not alone on material differences between it and the statute involved in the Adkins case but on the ground that the Adkins case was no longer a controlling precedent over such legislation. The dissenting Justice after quoting from the petition on which the writ of certiorari was granted said: "Unless we are now to construe and apply the Fourteenth Amendment without regard to our decisions since the Adkins case, we could not rightfully avoid its reconsideration even if it were not asked." (Morehead v. N.Y.ex rel. Tipaldo). From this it can be seen that Justice Stone took an entirely different view of the ground on which the writ was granted. His view enabled him to reconsider the holding in the Adkins case and find that the case of Nebbia v. New York, 291 U.S.502 changed the ruling in the prior case.

Looking at the cases which have ruled on this phase of the Fourteenth Amendment it is evident that there is no absolute freedom in the contract of employment between employer and employee. In the case of Holden v. Hardy (169 U.S.366) the court considered an Act of the Utah Legislature, restricting the hours of labor in mines and smelters. This statute was sustained as a legitimate exercise of the police power, on the ground that the Legislature had determined that these particular employments, when too long pursued, were injurious to the health of the employees, and that, as there were reasonable grounds for supporting the determination on the part of the Legislature, its decision in that respect was beyond the reviewing power of the Federal courts.

In Muller v. State of Oregon (208 U.S.412) the court upheld an Oregon statute which made it a crime to employ a woman more than ten hours in a day in any mechanical establishment, or factory, or laundry, in the State. The court said that a woman's structure and a proper discharge of her maternal functions justify legislation to protect her from the greed of her employer.

In Bunting v. Oregon (243 U.S.426) a State statute forbidding the employment of any person in any mill, factory, or manufacturing establishment more than ten hours in any one day, and providing payments for overtime not exceeding three hours in any one day at the rate of time-and-a-half of the regular wage, was sustained on the ground that, since the State Legislature and State Supreme Court had found such a law necessary for the preservation of the health of employees in these industries, the United States Supreme Court would accept their judgment in the absence of facts to support the contrary conclusion. In this case the court did not hesitate to uphold the statute although it did regulate indirectly the wages in the industries affected for overtime work.

From looking at these cases it can be readily seen that the State may restrict the individual's power of contract in regard to employment without conflicting with the provisions of the Fourteenth Amendment. The question which is not definitely settled is whether or not the State may regulate the wage element of the employment contract. The Adkins case said no but that was in 1923 by a five-to-four decision, and since that time the case of Nebbia v. New York

(supra) was decided in which a minimum State price regulation in the milk industry was upheld. In that case the court declared: "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a State is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the Legislature to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio." (Nebbia v. New York). This statement would seem to throw considerable doubt on much that was said in the Adkins case.

The Morehead in its last analysis really does not help much to settle the law in regard to minimum wage legislation, despite approving dicta. It did not involve a reconsideration of the Adkins case so that case still remains as the outstanding authority on the subject nor did it decide on the validity of a minimum wage based on or limited by, reasonable value alone so that the question is still open. What it decided was that, requiring reasonable value to be considered as a standard along with the living wage standard is not enough to remove a statute from the field of invalidity laid out in the Adkins case.

It is unfortunate that the Attorney-General in his efforts to uphold the statute did not directly attack the holding in the Adkins case instead of trying to distinguish the New York Act from the District of Columbia Act. If that had been done the majority of the court could not have dodged a reconsideration of the earlier case. The Nebbia case upheld a fixing of the price element in the sale of milk but to our mind that case cannot be cited as a direct authority in support of minimum wage regulation as there is no reason to identify the conditions in the milk industry to those existing in the employment of women in industry.

All hope for an early settlement of the question vanished when the Supreme Court recently denied the Attorney-General's petition for a re-hearing of the case in which a reconsideration of the Adkins case in the light of later decisions was specifically requested. It remains now to wait until a similar minimum wage law from one of the other eighteen states which have adopted similar legislation reaches the Supreme Court to see what the holding will be.

EDWARD SHANLY DERMODY

BANK NIGHTS

CONSIDERATION - BENEFIT TO LOTTERY OPERATOR

CONDITION OF ATTENDANCE IN VICINITY

The Penal Law of New York §1370 states: "A 'lottery' is a scheme for the distribution of property by chance, among persons who have paid or agreed to pay a valuable consideration for the chance, whether called a lottery, raffle, gift-enterprise, or by some other name." 38 C.J.286 defines a lottery as follows: "A species of gambling which may be defined as a scheme for the distribution of prizes of things of value by lot or chance among persons who have paid or agreed to pay a valuable consideration for the chance to win a prize." Most states have statutes similar to ours, which define a lottery practically the same as Corpus Juris. The whole matter of defining a lottery is summed up very nicely by Mr. Justice Qua of the Supreme Court of Massachusetts, when he says, in Commonwealth v. Wall (3 N.E. (2d) 28), that a lottery is "a chance for a prize for a price."

With these definitions in mind, it remains to be considered whether a price is paid to participate in a bank night, for it is clear and beyond argument that the scheme embraces a chance for a prize.

One of the most recent decisions on the subject is that of the highest court of Tenessee in State ex rel District Attorney-General v. Crescent Amusement Co. Inc. (95 S.W. (2d) 310). The Corporation had been operating a bank night in its theatre and was charged with conducting a lottery. The players could stand in the lobby as the winner was there announced. No particular time for the drawing was set. Those playing might have to stand for two hours if they did not purchase tickets. The theatre was enabled to exhibit a cheaper picture and obtain a larger attendance. Nevertheless, the court held that it was not a lottery as the element of consideration was too remote. The practice was disapproved, but there was thought to be no legal ground for enjoining it. The decision is not too strong and is placed almost entirely on the weight of authority, the court using little independent reasoning on what constitutes consideration.

Directly to the contrary is the case of Commonwealth v. Wall, supra, decided last July by the Massachusetts Supreme Court. Here, too, the purchase of a ticket was not requisite. The name of the winner was called three or four times in the lobby and about five minutes was allowed for him to appear. Any person, except minors, could register free. The attendance was greatly increased on bank nights. All seats were taken and both the lobby and the street were packed. The court refused to be held to a strict interpretation of consideration. "'Price' in this connection means something of value and not the formal or technical consideration which would support a contract. On the other hand, a game does not cease to be a lottery because some, or even many, of the participants are admitted free so long as others continue to pay for their chances." The court here took what it felt to be a very realistic view of the situation. They felt that the advantage of being within the theatre and being thus enabled to watch the proceedings in comfort would be

enough to justify the jury in convicting the defendant, even though the mere increase in business and subsequent advantage to the theatre would not make the scheme a lottery,

The precise question has not been passed on by our own Court of Appeals. In People v. Miller (271 N.Y.44), the players were required to purchase a ticket to enter the theatre. After such purchase, a "free" chance to win the prize was given. No tickets for the prize were given except to those who had paid to be admitted to the theatre. This was not the usual bank night procedure and was very clearly a lottery, as a consideration was paid before one was eligible to win the prize.

The only New York case dealing with bank nights in their most common form seems to be People v. Shafer (160 Misc.174), a decision by Judge Kohlmetz of the Monroe County Court. The scheme there was held not to be a lottery on the ground that consideration was totally lacking. The purchase of a ticket was not a condition of the granting of the opportunity to participate in the award. It made no difference whether the player was in or out of the theatre and if the winner should not be inside, he or she could come into the theatre and claim the award without any conditions or requirements. The winner did not have to purchase a ticket to enter the theatre to claim the prize. No charge was made for registering. No obligation was assumed by the act of registering. The name of the winner was called in the lobby and in the street. He had five minutes in which to claim the prize. The court in its opinion stated: "I fail to see how the requirement of the participant in the threare or lobby constitutes the payment of a valuable consideration or an agreement to pay one. In my opinion, either the payment of a valuable consideration or the agreement to pay for the chance must precede the drawing. As already stated, there was a distinct understanding with the people who signed the book that they would not be required to pay anything for the chance and that they would assume no obligation whatsoever. They are not even required to purchase a ticket of admission and the winner could go into the theatre without any expense to him. The record shows that there was a total lack of proof that any consideration was paid or that there was an agreement, express of implied, to pay it."

The case usually cited in support of the contention that bank night is a lottery is State v. Danz (140 Wash.546, 250 Pac.37). That is a five-to-four decision holding an analogous set of facts to be a lottery. The prizes there consisted of merchandise, the game being called "Country Store." The theatre owner offered free chances for the goods to anybody who would ask for them. The winning number was announced in the lobby and if the winner were there, he could enter and claim the prize. The majority of the court felt that the intention of the defendant was to run a game whereby he could profit and the participants so regarded it. The increased advantage to the theatre was, in their opinion, a consideration. The fact that some tickets were free was of little weight with the majority. It was brushed lightly aside by suggesting: "If in the flourishing days of the Louisiana Lottery, its management had advertised that it would give a free ticket to the president of every bank in New Orleans, that would not have changed the scheme from a lottery whether or not any one or all of such free tickets were accepted." This case is criticised in State ex rel District Attorney-General v. Crescent Amusement Co., Inc. (supra), and was there stated to be

against the great weight of authority. There is obvious error in the reasoning of the court in the Danz case. The reference to the Louisiana Lottery shows the danger of reasoning by analogy alone. It is true, of course, that if the free tickets were offered only to a specified class of persons, the fact that free tickets were given would leave the scheme nonetheless a lottery.

In the Danz case, however, as in the true bank night cases, the free chances are offered to the public generally. Any person may obtain his chance free. No one need pay a consideration unless he wishes. The dissenting opinion of Mr. Justice Parker of the Washington court is clearly stronger, more logical, and has more support by authority than the prevailing opinion. The minority claimed that one could not be guilty of running a lottery unless he caused consideration to be paid for the chance.

After citing various cases showing that a distribution when all the chances are free is not a lottery, the opinion continues: "Our real problem, then, is as to whether or not any of the persons acquiring the numbered tickets and thereby the chance of receiving some goods upon the distribution being made from the state of the theatre, paid or agreed to pay a valuable consideration for the chance. Manifestly, anyone who would acquire such chance by receiving a numbered ticket without paying for admission to the theatre would not pay or agree to pay anything for the chance of receiving some goods. How, then, can it be said that those who paid admission to the theatre and received a numbered chance ticket at the same time, paid anything for such chance when it is plain that they could have received such chance ticket for nothing without paying for admission to the theatre? It seems plain to me that the offering and giving of the numbered tickets to those who paid admission to the theatre was as much a pure donation or gift to them, since the rights of both were exactly the same, insofar as their respective chances of having goods distributed to them upon the drawing of the duplicated numbered tickets are concerned, and both classes had absolutely equal opportunities to so acquire the chance tickets."

That this was contained in a dissenting opinion is unfortunate as far as principles of stare decisis are concerned. The majority opinion is, however, controlling only in the State of Washington. There is nothing to prevent the minority's excellent reasoning from being adopted by other courts. It is vindicated by the Appellate Department, Superior Court of Califorhia in People v. Cardas (137 Cal. App.(Supp) 788, 28 Pac. (2d) 99- Cf. infra), which specifically adopted the views of the minority in State v. Danz, claiming it more persuasive than the majority opinion.

The Supreme Court of Iowa held, by a unanimous court, in State v. Hundling (220 Iowa 1369, 264 N.W.608) that a bank night is not lottery. The court said. "The holder of the chance to win a prize in the case at bar was required to do two things in order to win a prize, first, to sign his name in the book, and second, to be in such proximity to the theatre as that he could claim the prize within two and one-half minutes after his name was announced. He was not required to purchase a ticket of admission to the theatre either as a condition to signing the registration book or claiming the prize when his name was drawn. In other words, paying admission to the theatre added nothing to his chance. Where, then, is the payment by the holder of

the chance of a valuable consideration for the chance which is necessary to make the scheme a lottery?"

The two main points relied upon to sustain the contention that there is a sufficient price paid to make the scheme a lottery are the benefit to the theatre owner and the condition of attendance in the vicinity of the theatre.

Thus in the Hundling case, as in practically every other of a similar nature, it has been argued that the fact that the theatre hoped to gain, or actually did gain some benefit, from the scheme in the way of increased attendance at the theatre would afford the consideration required. This argument has been almost wholly discredited. In State v. Danz it was not the main point relied upon to sustain the conviction. In Commonwealth v. Wall the court held that even though the scheme was in its other aspects a lottery and that the other facts authorized the jury to convict, that a charge to the effect that the theatre could draw a larger audience would be a sufficient consideration was erroneous. "We are of the opinion," said the court, "that the price must come from the participants in the game at least in part as payments for their chances and that the indirect advantage to the theatre of larger attendance is not in itself a price paid by the participants."

The Iowa case specifically rejects the argument and rightly so. The question is not whether the donor of the prize makes a profit in some remote or indirect way, but rather whether those who are taking the chance have expended anything for that chance. The supposed evil of all gaming and lotteries is that people playing may waste money needed for other things, on idle chances. The giving of the prize was never thought to be an evil or vice. The mere fact that the donor has a selfish motive in giving the prize does not change this. Every scheme of advertising naturally has for its object increased business rather than philanthropy.

As the Iowa court points out: "Even the corner grocer who gives candy to the children of the neighborhood may be prompted by that motive (increased business), but that does not make the gift unlawful. And if the grocer, instead of giving candy to all the children, gives it only to some as determined by lot, that circumstance does not make the gift unlawful. And in neither event is the gift made unlawful by the further circumstance that the business of the grocer in the neighborhood may be thereby increased. Profit accruing remotely and indirectly to the person who gives the prize is not a substitute for the requirement that he who has the chance to win the prize must pay a valuable consideration therefor in order to make the scheme a lottery."

Nor is this statement of the Iowa court without authority to support it. In one of the leading lottery cases in the country, Yellowstone Kit v. State (88 Ala.196, 7 So.538), the same argument was made. The defendant there had distributed free tickets to the general public. He had, it is true, charged admission to his medicine show, but the rules did not require attendance to win the prize. Mr. Justice Sommerville, writing for theentire court, in holding that the game was not a lottery, stated, "The suspicion, even though well founded, that these presents may have been given away in order to induce a larger crowd to assemble at defendant's performances, with the expectation that they would buy medicine, or

pay a fee for occupying a seat in the tent would be too remote to constitute a legal consideration for the tickets." It is the hazarding of money with the hope of obtaining a larger sum that the statutes against lotteries are aiming to prevent. But in bank nights and similar cases, nothing need be hazarded by the participants.

The other strong argument of those claiming that there is a consideration for the chance is that the mere attendance in the neighborhood of the theatre on the part of those who have the chance is sufficient consideration. That much of the bank night problem, at least, may be considered as settled in New York and it is fairly certain that it is not enough to make the scheme illegal.

In People v. Mail & Express Co. (179 N.Y.Supp. 640, af'd 192 App. Div. 903, af'd 231 N.Y.586) it was decided that there was no consideration demanded by a rule that the holder of the lucky number present himself at the office of the defendant within five days after the results of the drawing were announced. The feature of a gamble was found to be lacking. This view was upheld in the case of People v. Shafer (supra). The County Judge there said that if it was no consideration to require the winner to appear at the office within five days, it was no consideration to require the winner to appear on the stage within five minutes. Of course, if the condition required for obtaining the prize were so onerous that it would be practically impossible to obtain the prize without having purchased a ticket of admission to the theatre (such as requiring the winner to appear on the stage within, let us say, one minute), it would probably be held to be illegal.

The only authority in support of the view that attendance at a certain place is consideration is the discredited case of Maughs v. Porter (157 Va. 415, 161 S.E.242). In that case, a person holding a public auction sale of city lots advertised that an automobile would be given away to some person among those attending the sale to be determined by chance. The plaintiff in that action attended the sale and won the automobile. It was not delivered, however, and the action was brought to compel its delivery. The court held that the attendance at the auction was a sufficient consideration to support the contract, but that the contract was unenforceable because the scheme was a lottery (see infra). The case is unique, not only in the manner in which it arose and the issues tendered, but in the fact that it appears to be the only case dealing with lotteries which holds that attendance at a place by the holder of a chance is sufficient consideration to make the scheme a lottery. It has been severely criticized. (State v. Hundling, supra, University of Pennsylvania Law Review, Vol.80, p.744; Virginia Law Review, Vol.18 page 465). It is without support among text writers or court decisions. It cites no authority which sustains it; on the contrary, as pointed out by the Virginia Law Review, "the authorities cited in its decision seem to contradict, rather than to support, it." Under such circumstances, it seems hardly a safe guide to follow.

One other case on the subject should be noticed. It is People v. Cardas (supra). Here tickets were given to any and all who asked for them. No charge whatsoever was made. Those participating in the chance for the prize, which consisted of a free vacation for three days at Catalina Island, did not have to pay for admission unless they wished to stay to see the show. The lucky numbers were announced in the theatre, in the lobby, and on the street. The rules required the winner to be in or just outside the theatre. The court

held that nothing was hazarded by those taking chances and could not, therefore, be a lottery. The court here followed Cross v. People (18 Colo.321, 32 Pac.821), in which it was decided that the expectation that the donor might increase his business by reason of giving away prizes by chance was too remote a consideration to cause the scheme to be illegal. The California court in the Cardas case also held that mere presence at a particular place, when no fee was paid for admittance was not a thing of value.

From a consideration of all these cases, one is forced to the conclusion, however unwillingly, that bank nights as they are generally conducted are not lotteries. The winner could not enforce payment of the prize, of course, nor to do so, he would necessarily be forced to take an inconsistent position. Obviously, he could not enforce it as a gift and would have to prove a consideration. In so doing, he would bring the contract within the condemnation of the lottery statutes and could not recover as the contract would then be illegal. (Cf. Maughs v. Porter, supra). The question usually arises, however, on criminal prosecutions.

In such prosecutions, the defendant may, to my mind, justly claim that the scheme is not a lottery. True, two of the essential elements are present -namely, a valuable prize, and a recipient chosen by chance; but the necessary third element, a consideration paid for the chance, is missing. The one running the bank night must be careful no to require a ticket of admittance to the theatre or in any other way to cause those taking chances to pay for the opportunity to win. If he contents himself with allowing free registration, announcing the winner to those in the lobby and on the street outside, and giving sufficient time for those on the outside to claim the prize, the manager of the game will probably be safe from criminal prosecution.

The Massachusetts case is not entirely sound authority holding the scheme a lottery. Everything said in connection therewith was obiter dicta as it was necessary to reverse the conviction on other grounds. The Virginia case has been so criticised and discredited that it is of little value. The Danz case in Washington is a weak case based on faulty argument with a strong dissent, which dissent has been approved by the courts of other states. On the other side are cases of People v. Shafer, State ex rel. District Attorney-General v. Crescent Amusement Co., State v. Hundling, and People v. Cardas, (supra). The last two mentioned are very carefully considered, well written, and well argued cases. The decisions are based on good reasoning and find abundant authority to support them.

On the whole, I am inclined to agree with the closing paragraph of Judge Davis of the Tennessee Court in the Crescent Amusement Co. case, in which he says: "We do not, by this action, express our approval of the very widespread custom of distributing money at moving picture theatres on what is variously called 'Bank Nite.' 'Opportunit Nite,' etc. Such practice has been denounced in more than one theat rical magazine and showmen have denounced the screen lottery. There is good reason to support the oft-expressed view of our best-informed citizens, that the practice in question is detrimental to the show-houses themselves, as well as hurtful to the public morals. No doubt many of the most faithful patrons of the pictures are anxious to see the fad pass, and the houses devoted to their proper function of wholesome entertainment. But, under our statutes, we are not authorized to declare the practice to be gaming or the operation of lottery."

MORTON M. Z. LYNN

RECIPROCAL OBLIGATIONS OF HUSBAND AND WIFE - LIABILITIES OF EACH FOR NECESSARIES

Upon assuming the relation of husband and wife, the status of the man and woman is materially changed. Each must, of necessity, relinquish certain liberties and assume new obligations. The change brought about this union was more striking in centuries past than it is today. Under the old common law in England the husband and wife legally merged into one person.

The law was tersely stated in Bacon's Abridgment: "The husband hath by law power and domination over his wife." The relation of the parties is more fully described by the court in Apostle v. Pappas, (154 Misc.497). Speaking of the wife, Judge Lauer states: "She was his creature and his possession. She was debarred from the suffrage. She was excluded from the professions. She was restricted and controlled in many ways."

"It must be recognized," continues Judge Lauer, "that the contition and times of the twentieth century are different from those which existed in the days of Coke, Blackstone, and Littleton. The status of women during the seventeenth, eighteenth and nineteenth centuries and today is as radically different as the times. Broadly speaking it was the view of the law in the eighteenth century that the property of a woman became her husband's on marriage, that her body belonged to him, that he could retain her liberty at his pleasure, and that he could administer physical correction at his discretion, subject, of course, to the rule of moderation."

With this brief survey of the conditions in England in mind, it becomes necessary to determine the legal rights of a married woman under the common law rules. At common law the individuality of the woman completely merged in that of her husband. She could not make separate contracts which would bind her nor could an action be brought against her separately. The apparent reason for these rules was based upon the laws which permitted imprisonment for debt. If a woman could be sued upon a contract and had no property out of which an execution could be satisfied, her body might be taken and she cast into prison. The courts have said that this would seriously interfere with the rights of her husband to her society and so could not be allowed.

Thus, in Murray v. Barlee (1834 - 3 Myl. & K.209; 40 Eng. Reprint 80) the court said that at law a feme covert cannot in any way be sued, even for necessaries. Whether living with her husband and not allowed necessaries, or apart from him with an insufficient or unpaid allowance, she herself is free from suit.

At common law contracts of a married woman, as such, are absolutely void and of no binding effect. No personal liability can be adjudged against her. Only her separate estate, which rests upon equitable principles, can, under such principles, be taken to meet her obligations. (Warren v. Freeman, 1855, 85 Tenn.513).

Under common law rules, it is plain that a married woman may not contract in regard to her estate nor be sued on contracts. To this general rule, however, there seems to be one exception. The courts

have found it necessary in some instances to uphold the contracts of married women living apart from their husbands. Even this exception is limited and beyond the limitation, the rule against her contracting power finally prevailed, so that until the passage of statutes she could not, but in exceptional cases, contract for necessaries. The exception is stated by Blackstone (1 Com. 443), that there is one case where a wife may be sued as a feme sole, viz., where the husband has abandoned the realm, or been banished, for then he is dead in law. This rule was followed in Robinson v. Reynolds (1826 - 1 Aik. (Vt) 174), the court saying, "Where the husband is accounted in law civiliter mortuus, the wife may sue or be sued alone, as where the husband is exiled, banished for life, or has abjured the realm. So, too, where the husband is an alien, never having resided in the government, she is capable of suing and being sued alone. But we believe there is no principle of law that will authorize her to sue, or subject her to a suit, as a feme sole, where the husband is a citizen or subject of the government, on account of her having a separate maintenance, or of his temporary absence."

Likewise, in Gregory v. Pierce (1842 - 4 Met.(Mass) 478) the court said, "....where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and has deserted his wife, she may make and take contracts,.....and be sued in her own name as a feme sole,..... But to accomplish this change, desertion by the husband must be absolute and complete."

While it was, therefore, the established rule that law would not recognize the validity of a married woman's contracts, equity would, if she had a separate estate, compel payment of her contract debts for necessaries out of such estate. In England the courts seemed to be of the opinion that, in order to hold the separate estate of a married woman on her contracts, even in equity, there must be a charge on her property either express or implied. Early American decisions likewise hold that, in equity, the separate estate of a married woman could be charged with such debts as she might lawfully contract upon its credit. The courts of the various states differed merely as to what was necessary to constitute a charge upon her estate. The courts of Tennessee have held that the charge must be clearly manifested by express words and not left to implication. (Kirby v. Miller, (1867) 4 Coldw. (Tenn.) 3).

The California courts have held the direct expression of a married woman of an intention to charge her separate estate is deemed sufficient to create such a charge and the mere fact that the debt has been contracted by her for herself will ordinarily be held prima facie evidence sufficient to charge her separate estate, without proof of a positive agreement to do so. The point is to be determined by the intent. (Miller v. Newton (1863) 23 Cal.554). The courts agree than an intent is necessary to charge the separate estate of a married woman, but are in conflict as to the proof required to establish such an intent.

Liability of the wife under the Married Woman's Acts depends, of course, largely upon the wording of the statutes in the various states. The statutes in most of the states merely preserve to women their independent property free from the control of the husband, thus creating a legal estate out of what was formerly an equitable estate. Concurrent with the passage of these Acts came the abolition of the distinction between courts of law and courts of equity

and the rules as to imprisonment for debt. This allowed contracts of married women to be enforced by judgment and execution against their separate estates.

One of the early cases in New York on this subject was that of Yale v. Dederer (1858 - 18N.Y.274). It was an action on a note given by a married woman for the purchase of cows. The court stated that although the legal disability to contract remains, a married woman may, as incidental to the perfect right of property and power of disposition which the statute gives her, charge her estate for the purpose and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates.

In Maxon v. Scot (1873 - 55 N.Y.251), a married woman's separate estate was held liable on her contract for board furnished herself and her husband since she, in the contract, charged her separate estate therefor.

A partial extension of the old equity rule is found in Crisfield v. Banks (24 Hun 159). A married woman was held liable for the purchase of necessaries for which she had promised to pay, even though she had no separate property. The court said, "If that which was acquired bypurchase was the only separate property she had, she would still be liable to pay for it. By the purchase she created a separate estate, so far as the purchased property made one and no principle of justice will permit her to escape liability for the payment of the purchase price."

The court held in Eisenlord v. Snyder, (71 N.Y.45) that to hold a married woman liable under her contract for household assistance, it must be established, not only that she agreed to pay therefor, but that such services were for the benefit of her separate estate or that it was part of the alleged contract that compensation should be a charge on her separate estate.

To the same effect was the case of Smith v. Allen (1 Lans.101), where the court held that a promissory note of a married woman given for goods which had been purchased by her upon her credit, for family use while her husband was residing and co-habiting with her and supporting his family, is absolutely void. Such a contract has no foundation either in law, equity,conscience, or good rules unless there is some special agreement by which the goods are sold to the wife for her exclusive use upon the credit of her separate estate and not upon the credit of the husband.

It is thus apparent that even under the Married Women's Acts the courts at first required an express intent on the part of the wife in order to charge her estate with liability for necessaries. To this effect is the case of Weir v. Groat (4 Hun 193), an action to hold a married woman liable on her contract to pay. "In order to charge the separate estate, therefore, she must express such intention in her contract. This she has not done. Plaintiff labors under the false idea that such an intention may be inferred from her simple promise to pay. That would destroy the only distinction now remaining between the contracts of a married and an unmarried female. No case goes to that extent."

In Mayer v. Lethauer, (28 Misc.171), it was first intimated that a married woman might be held liable in the absence of an ex-

press promise. The court said, "It appears that defendant is a married woman living with her husband, and the principal point urged by the defendant upon this appeal is that the dress ordered by her being in the nature of a necessity, the husband was presumptively liable for the materials furnished and the services rendered and that the defendant could not be charged therewith except by an express promise on her part to pay therefor. This contention is not well founded. While an action may be maintained against a husband, under certain circumstances, for goods sold or services rendered to the wife, an action of that character may be brought directly against a married woman."

"When a married woman buys property, she benefits her estate by the addition of the amount of the purchase, and she is obliged to pay the purchase price for that reason. It is not necessary for her expressly to charge her separate estate." (Von Mallen v. Fuhrman, 56 Hun 402).

However, a married woman is not liable for medical services rendered herself and her children upon her request, where there is no express contract making her liable. (Richards v. Young, 84 N.Y. Supp.265).

Where the goods represent a direct benefit to her separate estate she is primarily liable. Where the benefit is only incidental, as in the case of necessaries, she may be held where she expressly contracts to bind her estate, the law saving her a recovery over against her husband in the absence of a valid assumption between husband and wife.

According to the rule in some of the states, the situation of the wife is changed where she is living apart from her husband. These states follow the rule laid down in Lidlow v. Wilmot, 2 Stirkie (Eng.) 86). In that case it was held that while a husband who turns his wife out of doors, or, by the indecency of his conduct, precludes her from living with him, is bound to provide her means of support adequate to her situation, yet if, either from the husband or from other sources, she is possessed of such means, the law gives her no remedy against her husband for necessaries furnished her by third persons. The husband is liable only in case of the insufficiency of funds. The only credit given to the husband is an implied one arising from the situation and inadequacy of the funds of the wife and if she is adequately provided for, the circumstances repel all idea of implied credit.

New York law as stated in De Brauwere v. De Brauwere, (203 N.Y.460) does not accept this rule. In this case, plaintiff, who had been abandoned by her husband, sued to recover the moneys which she had been compelled to pay out of her separate estate to provide necessaries for herself and her children. The court held, "The husband is under a legal obligation to support his wife and children and provide them with necessaries suitable to their condition. This liability would have been enforceable by the wife on her own behalf had it not been for inability at common law to sue her husband. The disability having been removed, a wife who has applied her separate estate to the purpose of an obligation resting primarily upon the husband, may now recover of him the reasonable amounts so expended.

In the case of a married woman living apart from her husband, the courts have held that an express intent is not necessary to charge her separate estate. The presumption which existed, while she was living with her husgand, that she was acting as his agent is not applicable in this situation.

In Wilder v. Brokaw (141 App. Div. 811) it is held that a wife living apart from her husband may bind herself by a contract for necessaries, the question being merely as to whether credit was extended to her or to her husband. Where the evidence is conflicting on that question, it should be submitted to a jury.

The basic distinction, therefore, between the liability of the wife under the common law and under the Married Women's Acts is that under the statutes she is allowed a recovery over against her husband on the obligation for which he is primarily liable. Under common law, of course, she was unable to sue her husband.

One exception to the rule concerning a husband's liability for necessaries is found in the case of funeral expenses of the wife. In Watkins v. Brown, (89 A.D.193), which was a suit by an undertaker to recover the expense of burying the defendant's wife who had been living apart from him, the court held that the surviving husband is under a legal obligation to bury the corpse of his wife. The husband, however, is allowed to reimburse himself from the separate estate of his deceased wife, if she left an estate.

Also, in the Matter of Stadtmuller, (110 App. Div. 76) the court held that the wife's estate may be held liable to the husband for flowers and funeral expenses, but the husband remains liable for the physician's services during the wife's last illness.

The modern trend toward the complete emancipation of women is shown by the language used in Apostle v. Pappas (154 Misc.497). Although the remarks of the court were merely dicta, the court holding the expense incurred unreasonable, the case presents a fair indication of the present attitude of the court as to the position of a married woman today.

In this case, plaintiff, an undertaker, seeks to assert a lien on a life insurance policy in favor of defendant. The policy was on the life of the defendant's husband who died while defendant was in Europe. The court stated, "With the present day tendency to emancipate women completely and confer upon them rights which have been heretofore denied, it may well be said that their obligations to some extent have increased and in other respects ought to be increased..... There is merit in the argument that the law should recognize a legal duty upon the 'modern woman' to contribute to the necessaries of the family, such as medical expenses, if her husband is unable to do so, and to bury him if his estate is incapable of doing so.

"Where the estate of the deceased is incapable of paying for the funeral expenses, the duty of burial places upon the surviving spouse a liability for reasonable funeral expenses. This is so insofar as the husband is concerned, whether we base the husband's liability on the ground of common decency, public policy, or on the theory of necessaries. It would appear to be equally sound in its application to the widow and it is unnecessary to resort to technical analogies basically founded on an obligation to furnish neces-

saries in order to support it. It would seem that the reasonable funeral expenses to decently bury a woman's deceased husband, where his estate is incapable of paying them, should be chargeable against her own separate estate, if adequate, as an obligation imposed by law which arises out of the rights and duties inherent in the marital status, and from a public policy to decently bury the dead."

Recently an attempt has been made to charge the estate of a married woman for the medical expenses incurred in her last illness. In a claim by the executors of a married woman to recover such expenses from her husband (Matter of Burt, 160 Misc.218), the court held: "The expenses of the last sickness are necessaries. It has been held that where the wife leaves a separate estate, it is liable for the funeral expenses.....In view of the changed status of married women, there is merit in the argument that a woman decedent whose separate estate is capable of paying should stand the charge for medical services which she has accepted. The intention to charge her estate may be implied for all the circumstances. The change in status should lead the courts to recognize the inapplicability of some rules of law which were based on the legal disabilities of married women."

The increasing liability of the wife imposed by the courts is shown by the addition of medical expenses to the necessaries for which a wife's estate may be held liable.

The trend toward the complete emancipation of women is suggested by the case of Hodson v. Picker, (159 Misc.356). The court here attempted to place upon the wife a duty equal to that of the husband where the latter is unable to meet his legal obligations. This was an action to compel a wife to support an indigent husband who had become a public charge. In enforcing the liability the court stated: ".....It would seem that the same public policy which imposes a duty upon the husband to support his wife when she is in need and even when she is not in need, required the wife to support a dependent husband when he is in actual need.

"With the emancipation of woman and the conferring upon her by government and society with rights equal with those of the man, she must also assume and respond to obligations. When public policy and law places an obligation on the husband to provide for his wife, a reciprocal obligation should be assumed by the wife if she is able to do so.

"....The development of the common law with all its restrictions upon women naturally resulted in the evolution of the theory that the obligation for the support of a spouse rested only upon the husband.....Those restrictions have now been removed. A married woman is almost in all respects a feme sole. She participates in affairs of government first as an elector and she may participate as an actual official of the government. Laws are no longer made for her or in derogation of her rights; she participates in law-making. Woman equally with man is responsible for the law. Having acquired all the rights the husband possesses, she should be placed under obligations."

DALWIN JOHN NILES

QUESTIONS AND ANSWERS DEPARTMENT

The following questions are taken from cases presented in this issue, and from other cases of interest. All legal topics are included, and present a fair method by which you can test your own, or anyone else's legal knowledge. Compare your answers with those given on page 58 of this issue.

1. Can the beneficiary recover on a life insurance policy, the application not being annexed thereto, delivered by an agent of the insurer at a time when the insured was in a hospital, if plaintiff or the insurer (a) had actually conspired with the agent to effect the insurance? (b) Knew the agent would not report the fact to his principal? (c) Thought the agent might not so report, but made no inquiry?

2. Must a husband support a wife who abandons him unjustifiably (a) where she is industrially incapacitated, without means of support and likely to become a public charge? (b) Where she was convicted of prostitution, contracted a bigamous marriage, and is afflicted with a venereal disease?

3. Can a beneficiary who caused the death of the insured, recover on the policy where convicted of (a) manslaughter? (b) Murder?

4. A state enacts a Minimum Wage Law for women in which the standard set up for determining the wage to be paid is the necessary cost of living sufficient to protect their morals and good health. (a) Is such legislation valid under the due process clause of the Fourteenth Amendment? (b) Is such a law valid which sets up both the reasonable value of the services and the cost of living as standards?

5. On a trial for receiving stolen goods, evidence is offered tending to show that defendant at other times received other stolen goods. Is such evidence admissible (a) Where the goods were stolen by the same thief from different owners? (b) Where defendant received them from different thieves?

6. A theatre owner offers a valuable prize, the winner to be determined by chance. Do such facts constitute a lottery (a) Where to be entitled to participate, purchase of a ticket is requisite? (b) Even though residents of Schenectady are admitted free, and the winner is such? (c) Where no purchase is required, but the winner must appear on the stage within a reasonable time? (d) Where the latter condition results in increased patronage?

7. (a) Is the estate of a married woman liable for medical expenses incurred during her last illness? (b) If so, may the estate recover from the husband? (c) Can a married woman be held liable for the support of an indigent husband where he is liable to become a public charge?

RES INTER ALIOS - EVIDENCE OF KNOWLEDGE - RECEIVING GOODS FROM DIFFERENT THIEVES

"This court is reversing the Appellate Division for its act in enforcing the doctrine which we have always announced to be the true one. When a court of last resort violates the rule stare decisis, nothing except obscurity can result. Members of the bar will be unable to advise clients, trial judges will be without guide in charging juries, intermediate courts of review must be filled with confusion. The application of general principles will become impossible."

The above is very strong language when spoken by the judiciary. It seems especially strong when set forth as the nucleus of a dissenting opinion as it was in the case of People v. Marino, (271 N.Y.317). The quotation is by Judge O'Brien, with whom Judge Hubbs and Judge Crouch concurred, and was aimed directly at the prevailing opinion in that case. The alleged violation of the stare decisis rule arose from what appears to be a reversal of the law in regard to receiving stolen property as enunciated in People v. Doty (175 N.Y.164). A brief summary of the facts of the case in question might be helpful, at this point, in the analysis of this extraordinarily bitter diversion of judicial opinion.

The defendant, Sam Marino, was charged with violating §1308 of the Penal Law in having received, concealed, and withheld a Buick automobile which had been stolen from one Joseph Bichelman, and which the defendant knew to have been stolen. The defendant was tried and convicted. Upon appeal, the Appellate Division affirmed the facts but reversed solely upon the law. And here is where the dispute arises.

The prosecution offered in evidence admissions by Marino that he had sold cars stolen by other thieves to other customers. Typical of the testimony in this connection was that of one Jansen, a customer of Marino's in the stolen car market. Jansen stated on the witness stand:

"He (the defendant) said he couldn't get me that car, that I would have to take a hot car. He said that he had a Dodge, a 1933 Dodge that he would sell me. He said that the Dodge was hot."

The above evidence was admitted by the trial court and has been sustained in the prevailing opinion of the Court of Appeals. In its essence its admission is the basis for the "reversal on law" by the Appellate Division, and is the basis for Judge O'Brien's vigorous dissent. It is quite evident that such testimony would prove most damning to Mr. Marino's case. If it could be shown that buying and selling "hot" cars was Marino's customary occupation, it would not be difficult for the jury to draw a conclusion very unfavorable to the defendant upon the transaction in question at his trial and it is upon this ground of prejudicial and incompetent admission of evidence that the dissenting Judges take their stand.

It is their contention that as the other stolen car transactions were separate and distinct from the one in question, evidence

as to them is irrelevant. For example, Mr. Jansen's purchase of the "hot" Dodge car was an entirely different transaction from the purchase and sale of Bichelman's Buick. Marino received the Dodge and the Buick from different thieves and sold them to different customers. The dissenters claim that the admission of evidence of one of these transactions in the trial of the indictment based upon the other is absolutemy unfounded. People v. Doty, as mentioned supra, is cited as substantially the minority opinion.

In the Doty case, the defendant purchased stolen hides from young boys. He was tried and convicted for receiving the second hide that the boys brought to him, largely upon evidence of his purchase of the previous hide from the same boys, but in a prior transaction. In that case, the defense interposed an objection that went even further than the one urged in the Marino case. The contention was made that the evidence of the prior transaction should not be admitted unless it be shown that the first hide was stolen from the same owner as the second. The court in the Doty case said this was not necessary, but added that it must be shown that they had both been stolen by the same thief.

That, of course, is the crux of the argument, because in the case of People v. Marino, the automobiles in question were concededly stolen by different thieves from different owners. Therefore, it is easy to ascertain whence came the cry of stare decisis by Judge O'Brien. People v. Doty states positively that evidence of previous reception of stolen goods is admissible only when the goods were received from the same thief. It might be argued that, in the light of the facts in the Doty case, the holding as to the necessity of the "same thief" element appears to be dicta, nevertheless, the rule set forth has always been regarded as the law of this State, and, upon this assumption the court decided the Marino case. The case at hand says equally positively that the "same thief" element is not necessary. The problem is to justify the majority ruling in the latter case.

At the outset, the majority opinion makes a somewhat obviously feeble stab at distinguishing the two cases. The distinction between stolen hides and stolen automobiles as a legal principle, however, is so faint that the point is not seriously urged. Next, the court intimated that the statement as to the absolute necessity of the "same thief" element in the Doty case amounted to a slight slip of the pen. The court here points out that the "intention" of the Doty opinion was to express a general principle and not lay down a hard and fast rule. This, of course, might well be true but it is scarcely a satisfactory rebuttal to Judge O'Brien's statements. But again, it doesn't seem that the majority of the court were unduly serious in this argument, because, at this very point in the opinion, the statement is set forth which seems to be the real basis of the holding. It is as follows:

> "A reasonable person of ordinary intelligence would rightly conclude that a dealer in cars who had sold three or four stolen cars knew them to have been stolen if he had sold other stolen cars about the same time and referred to them as 'hot' or stolen cars, and cautioned his customer about them."

In other words, the court points out that, in the light of rea-

son and "ordinary intelligence," if a person boasts of his dealings in stolen cars, it makes no difference if he received them all from one or all from different thieves. In either case his guilty knowledge is equally well shown by the admission into evidence of those boasts. In addition to this, the wording of §1308 of the Penal Law seems clearly to support this point of view. The Section says:

> "A person who buys or receives any property knowing the same to have been stolen.....is guilty of a felony....."

Under this Section, therefore, it is not necessary to show that the receiver knew who the thief was at all. The essence of the crime is receiving the property with the guilty knowledge that it had been stolen. The evidence admitted in the Marino case clearly tends to show such guilty knowledge.

The prevailing opinion of the court, however, does not reverse the Doty holding in quite such an arbitrary manner. Chief Judge Crane points out that the Doty case itself expanded the rule to a certain extent when evidence of transactions with the same thief but in relation to property stolen from different owners was admitted. Prior to that time it seems that it was necessary that the property itself come from the same owner as set forth in the indictment. Thus, says Chief Judge Crane, the Marino opinion is merely another step in the expansion already begun. And, finally, to support the entire "expansion" theory, a quotation is set forth from the case of Funk v. United States (290 U.S.371, 381):

> "The fundamental basis upon which all rules of evidence must rest - if they are to rest upon reason - is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at one time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or wisdom of the old rule."

Thus we see that while under the hard and fast application of the rule stare decisis, the dissent is correct in all that it expounds, nevertheless the greater rule of fundamental justice is clearly best served by the prevailing opinion. And, happily, we have the authority of the Supreme Court of the United States to the effect that notwithstanding stare decisis and its laudable purpose, the law can and will develop with the times, and that an earlier and fallacious holding need not forever be a millstone around the neck of justice.

MARTIN SCHENCK

LIFE INSURANCE - LIMITATION OF DOCTRINE OF IMPUTATION OF AGENT'S KNOWLEDGE TO PRINCIPAL

During the trial of the issues in Hurley v. John Hancock Mutual Life Insurance Company (247 App. Div. 547) defense counsel requested the court "to say to the jury that if the jury believe that the insured or plaintiff knew or had reason to believe that agent Brown would conceal or not report to the defendant information which he had concerning unsound health of the insured prior to date of said policy, no such knowledge can be imputed to the defendant." The request was not granted, and the Appellate Division, Fourth Department, reversed the judgment for the plaintiff and ordered a new trial.

Thus was pointedly questioned the authority of Bible v. John Hancock Mutual Life Insurance Company (256 N.Y.458), New York's leading case on a like set of facts, exclusive of the charge. Should the question reach the Court of Appeals, and the ruling there be sustained, this authority will not only have been limited, and that made a question of fact which was formerly immaterial as matter of law, but because of the very wording of the charge such affirmance would constitute a practical reversal of the Bible case. It will be noticed that the phraseology is "knew or had reason to believe," (not "believed") a statement only a step from the more powerful and common "knew or should have known."

The defendant in the Hurley case (supra) issued a policy of life insurance upon the life of plaintiff's daughter. Mr. Brown, the agent who solicited this insurance and who delivered the policy, knew that the insured was confined in the Onondaga County Sanitorium at the time, but notwithstanding such knowledge he urged the plaintiff to take out the policy, assuring her that once she got the policy in her hands "she was covered." By its terms the policy was not to take effect unless upon its date the insured was in sound health, and only the secretary could waive medical and hospital attendance, etc., but the application was not attached to the policy. It appeared that Brown was more than a mere soliciting agent.

The opinion reads at p.550: "It is a well-settled principle of agency that, as a general rule, the principal is bound by notice to or knowledge of his agent in all matters within the scope of the agency, although in fact the information may never have actually been communicated to the principal.....A clear question of fact was raised as to the agent's knowledge of decedent's physical condition and her treatment in the tuberculosis sanatorium at the time of the delivery of the policy, which was decided in plaintiff's favor after a clear and comprehensive charge, and we would have no hesitation in affirming the judgment were it not for the failure of the trial court to charge a request of the defendant, which we think was a fair statement of the law, and which should have been charged."

Indeed there could have been no hesitation upon the authority of the Bible case (supra). The similarity in facts covers confinement in hospitals, provisions of the policies, failure to attach the applications, and powers of the agents. There Cardozo, Ch.J., writing the opinion affirming judgment for the plaintiff, says: "If

at the time of delivery and the collection of the premiums, he (the agent) was informed that the insured was in a hospital and ill, he was under a duty to communicate to his employer the information thus acquired..... In the absence of warranty or warning, the delivery of the policies by the insurer, and the keeping of the premiums with knowledge of a then existing breach of the condition as to the health of the insured and her treatment in a hospital gave rise to a waiver or, more properly, an estoppel." To like effect are Whipple v. Prudential Insurance Co., (222 N.Y.30); McClelland v. Mutual Insurance Co. (217 N.Y.336); Ames v. Manhattan Life Insurance Co. (40 App. Div. 465, 167 N.Y.584).

The opinion in the Hurley case qualifies that general rule with the statement at p.550 that "the mandate charging the principal with knowledge acquired by his agent in reference to matters over which his authority extends has no application where the facts are such as to warrant the inference that the agent will conceal or withhold his information from his employer."

Plaintiff's argument, concerning the cases cited by the court in support of that quotation, might be that neither of the representatives of the insurance company in McCormack v. Security Mutual Life Insurance Company (220 N.Y.447) was charged with any duty in respect of issuing of policies, their reinstatement, or the waiver of conditions, so that notice to them could not be notice to their principal; that the facts in Granite Bond & Mortgage Corp. v. Hutchins (225 App.Div. 412) reveal that the agent was actually corruptly conspiring; that the assured in Axelroad v. Metropolitan Life Insurance Co. (242 App. Div. 400, aff'd 267 N.Y.437) never gave the answers in question,but the defendant's agent thereafter, without the knowledge of the insured, inserted them in the application; that the drafts involved in Gunster v. Scranton Illuminating, Heat&& Power Co. (191 Penn. St. 327, 37 Atl. 550) were signed by the agent to his own order as an individual, following which he appropriated the proceeds to his own use, his principal gaining nothing by his act; that the result of the transactions of the agents in Camden Safe Deposit & Trust Co. v. Lord, (67 N.J.Eq. 489; 58 Atl.607) was that "in their own interest they were contracting with themselves, to advance money on a mortgage....which they intended to misapply, or aid in so doing;' that the motive prompting the overdraft by the agent in Merchants National Bank v. Nichols & Shepard Co. (223 Ill.41, 79 N.E.38) was to replace money which he had misappropriated; but any distinction so drawn must be one without substance, as for instance that the only benefit to Brown was the retention of his commission, rather than a misappropriation of the whole premium payment. Because of the very nature of a contract of insurance the question cannot be one merely of partial or total monetary benefit to the insurance company. The defendant was, beyond its share in the premiums, vitally interested in the degree of insurability.

Pomeroy says in §675 of Equity Jurisprudence: "If, in the course of the same transaction in which he is employed, the agent commits an independent fraud for his own benefit, and designedly against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal. then the ordinary presumption of a communication from the agent to his principal fails; on the contrary, a presumption arises that no communication was made, and consequently the principle is not affected with constructive knowledge."

At p.11 in Henry v. Allen (151 N.Y.1) the court say: "When an agent abandons the object of his agency and acts for himself by committing a fraud for his own exclusive benefit, he ceases to act within the scope of his employment and to that extent ceases to act as agent."

Thus far it has been noticed that the general rule is that where the agent is acting for his own benefit, knowledge which he has received will not be imputed to his principal, whether the person dealing with the agent knows or does not know that the principal will not be informed. The quotation from Pomeroy, and the holdings in the Henry, Granite Bond, Gunster, Camden, and Merchants cases are all illustrative of this proposition. In none of these cases was the question of knowledge or state of mind of the third person with whom the agent dealt a determining factor.

The position of the Bible case thus becomes that of an exception to or an overruling of the general rule only insofar as an action upon a policy of life insurance is concerned; there information of the agent is imputed, the question of presence or lack of knowledge on the part of the plaintiff that the agent will or will not perform his duty to his principal still being an immaterial element as matter of law.

In turn the case at bar overrules the Bible case to the extent that it injects the question of fact as expressed in the request to charge. It is then an exception to a case which is itself an exception, in instances of actions upon insurance policies, to the general rule.

In Mutual Life Insurance Co. v. Hilton-Green (241 U.S.613), which was an action upon a life insurance policy, the application attached to which contained false statements to the effect that no previous applications had been rejected and that the applicant had undergone no medical treatment within a specified time, it was held that the general rule that the knowledge of the agent was ascribed to the principal did not apply where the circumstances plainly indicated to the plaintiff that the agent would not perform his duty, and would not reveal his information to his principal. The approved charge was an instruction to the jury that the insurance company knew the actual facts if the jury "should find that an agent whose knowledge would be the knowledge of the defendant did so know," but what the plaintiff could not recover if "you further find from the evidence that there was an understanding, tacit or expressed, between Wiggins (the insured) and the said agents to procure the policies by collusive co-operation to conceal the truth from the company as to the several matters inquired about."

In Mechem on Agency one exception to the general rule that knowledge of the agent is knowledge of the principal is stated to be an instance in which the agent is acting adversely to the principal, and that authority says in §1826: "Obviously no policy requires that such a presumption (as to the applicability of the general rule) shall be made for the protection of a person who has conspired with the agent to defraud the principal and who now seeks the benefit of a presumption that a duty has been performed which he himself was interested in having violated."

The plaintiff in National Life Insurance Co. v. Minch (53 N.Y.

144) sued to recover the amount paid following death of the insured. A conspiracy was alleged between the deceased, her husband, and Dr. Potter, the medical examiner for the plaintiff, to fraudulently obtain a policy of insurance upon the life of Mrs. Minch. The trial court refused to allow the plaintiff to go to the jury, and to charge "that if from the evidence they believed it was known by the husgand, Dr. Potter, and the deceased that she had a cancer which was incurable, and that there was an understanding between them that they were to obtain an insurance upon her life, at the time knowing she was incurably diseased, the plaintiff was entitled to recover." The refusal was held to be error, and the court say at p. 150: "If a person colludes with an agent to cheat the principal, the latter is not responsible for the acts or knowledge of the agent. The rule which charges the principal with what the agent knows is for the protection of innocent third persons, and not those who use the agent to further their own frauds upon the principal."

From these instances it appears that as a condition precedent to any previous exception to the Bible case it was necessary that the facts disclose some degree of active collusion. But the case at bar goes even further than cases of collusion by making mere knowledge or belief an additional exception. Nor does it necessarily stop there; in the language of the court there is an inference that mere negligence is also to be included; the possibility that an actual state of mind will not be required, but that notice or duty to inquire will be sufficient, and that no recovery can be had if the jury finds negligence in failing to make a reasonable inquiry. Shall the Bible case, exception that it is, continue to be the law of New York, or can there be a justification for the holding in the Hurley case? It seems that the ruling of the Appellate Division in the latter can be adequately supported.

The Court of Appeals saw fit in its decision in Axelroad v. Metropolitan Life Insurance Co. (supra) to say at p.443: "It must be conceded that the courts have sustained obligations assumed by insurance companies under conditions where the courts would have hesitated to sustain other kinds of obligations. At least where assurance has been given by an agent or employee of an insurance company that an applicant was protected by insurance, the courts have struggled to find some way to spell out a valid contract of insurance, and perhaps their decisions have, at times, marred the symmetry of the law. Indeed this court has been compelled by candor to recognize that it did not always apply to insurance contracts the same rules applied to other contracts." Whatever inference one derives from this excerpt as possibly indicating the nature of a future ruling by that court on the case at bar, there is a clear recognition of a variance in the law of insurance, with the additional indication that the court desires that this be not continued when a proper opportunity to effect uniformity arises. Such an opportunity is again presented in the instant case.

On the basis that "the insured or plaintiff knew" that the agent would conceal the information, there are three aspects which may receive brief comment.

Because of its questionable position insofar as good faith is concerned, a plaintiff in such circumstances would have great difficulty in urging that as between two innocent parties the insurer should bear the loss caused by the act of a third person whom it permitted to act. Indeed the case of Allen v. South Boston R.Co.

(150 Mass. 200, 22 N.E.917) with its statement that the act "bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master," fully answers any such suggestion.

If the argument be true that the Hurley case is within the exception rather than the general rule, the first time the insurance company has knowledge of the health of the deceased comes when proof of claim is made in due form exhibiting the condition of health at the time of the delivery of the policy and earlier, and since ratification presupposes a knowledge of all the material facts, any acceptance and retention of premiums during the life of the deceased must fall short of constituting such ratification.

It is of course true that §58 of the Insurance Law was enacted to safeguard beneficiaries from the application of the technical doctrines in relation to warranties by providing that upon annexation of the application all statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties. Breach of a warranty, however, still necessarily and ipso facto avoids the policy, and it is only in the absence of fraud that a statement made by the insured will be deemed a representation and not a warranty. By another statutory provision the policy is contestable by the insurer for the first two years it is in force during the lifetime of the insured. The statements in the applications which would necessarily have been included in both the Hurley and Bible cases, were the policies issued on that basis, would be warranties because they were characterized by and included the element of fraud, which could easily have been established by proof that the persons making them knew that the statements were false, from which could be inferred an intent to deceive and cheat. In each of these two cases the insured died within two years from the date of issuance of the policy. Upon the facts all serious controversy would have been precluded had the insurer taken advantage of the statutory provision designed for the aid of beneficiaries, yet which does, as illustrated by the results of these same cases, inure to the benefit of the insurance company for two years. By the very reason that §58 was not designed for the protection of the insurer, this argument cannot be urged too strongly in its behalf, but to permit the plaintiff to profit by the neglect of the defendant to attach the application, would be, under the circumstances, most inequitable.

Insofar as the "had reason to believe" phrase is concerned it may be that these particular words are not to be put in the category of loose language, but rather making applicable the principle of negligence previously mentioned, and not necessitating an actual state of mind on the part of the plaintiff. At another point in the opinion appear the words that knowledge of the agent will not be imputed to the principal where the facts are such as "to warrant the inference" that the information will be withheld. Whether or not this be an indication that the court intended its holding to include the proposition of negligence, this broader interpretation can also be sustained.

In other titles of the law the principle is applied that there can be no recovery by a person who fails to make reasonable inquiry when the duty to do so is present, and that inquiry would reveal a situation unfavorable to him. The activities of the insurer are largely governed by statute and that regulation is strict in most

instances. In any other contract the rule of good faith is applied to both parties, and while the honesty of applicants for insurance of course cannot be made certain by any statutory regulation, any indications of dishonesty should be harshly dealt with by the courts as they are in any other action when such instances are found by a jury to have existed.

As was said in the Axelroad case: "If we apply to contracts of life insurance the same rules applied to other contracts, then it seems evident that the plaintiff cannot recover here." Certainly as was stated in the Hurley case, "The general rule relating to knowledge of the agent being imputed to the principal was never intended as a shield for unfair dealing."

JAMES TERRENCE GRIFFIN.

N O T E S

CARRIERS - PRORATION OF DAMAGE UNDER VALUATION AGREEMENT:- Where a shipment of goods being transported by a common carrier is lost or damaged, the measure of damages is the market value of the goods at the point of destination. (Strauss & Co., Inc. v. Canadian Pacific Ry., 254 N.Y.407). Carriers have attempted in various ways to limit their liability by agreements exempting them from liability; by valuations based on invoice agreements, and by declared or stated valuation agreements. Under the valuation agreement the rate charged is proportioned to the value stated. The right of a carrier to base rates on value has always been regarded as just and reasonable. A declared value by a shipper for the purpose of determining the rate is not an exemption from statutory or common-law liability. (Kansas City Southern Ry. v. Carl, 227 U.S.639). This is so because the carrier is entitled to a rate commensurate with the risk that he assumes. In case of a loss the recovery of the shipper is rightfully limited to the declared or stated value.

Under a valuation agreement if the loss is complete the recovery is the stated value. But where the loss is partial the question arises as to what is the proper measure of damages; whether the shipper will be permitted to recover for his actual loss, or whether his recovery will be limited to the proportionate amount of the loss that the stated value bears to the actual value. The question is one of interpretation of contracts. The contract is construed most strongly against the carrier for it drew up the agreement. (Hoye v. Pa.RR., 191 N.Y.101). Where the value is stated at so much per pound, per ton, or some other unit of weight or measure, and the rate is calculated on such agreed value the shipper may recover in case of partial loss only the limited value per unit. (Kansas City Southern Ry. v. Carl, supra; United Lead Co. v. Lehigh Valley RR., 156 A.D.525, af'd 215 N.Y.751).

The courts have never held that an agreement upon a value is a warranty that the goods are not worth a larger sum. "The effect of the stipulation is not to fix a limit in case of loss and a proportionate limit in case of injury, but to fix an amount which shall be the limit of recovery whether for loss or injury."(5 American & British Encyclopedia of Law (2d Ed.) 335). Liability for partial loss should not be construed to be a proportionate liability unless there is an agreement so providing. To say that the shipper may recover only that portion of the actual loss which the declared value bears to the actual value when the loss is partial would be writing out for the parties a contract different from the one which they themselves have made. (Chenango Textile Corp. v. Willock, 247 A.D. 638).

Thus, a partial loss will be prorated only where the contract expressly provides for it; for example, "....and in case of partial loss or damage" the carrier "shall not be liable for more than such a proportion of same as fifty dollars, or the value declared herein, bears to the actual value, if greater." (Greenfield v. Wells Fargo & Co., 134 Supp. 913): or where the value is stated at so much per unit and the rate is calculated on such agreed value. (Kansas City Southern Ry. v. Carl, supra).

Where a gross value is declared on a shipment a recovery will

be permitted up to the stated value unless the valuation is declared at so much per unit. A value unit should not be implied from a declaration of gross, for that would be writing out a different contract from that made by the parties. (Chenango Textile Corp. v. Willock, supra). The rule as stated in Mallison & Co. v. Barrett, 215 A.D.524, is apparently in conflict with this rule, but that case has been distinguished (Chenango Textile Corp. v. Willock, supra) and has been limited to the facts therein (Aronstein v. New York Central RR Co., 132 Misc. 563).

The rule as laid down in the Chenango Textile Corporation case has support both in reason and the authorities, and it should, therefore, be followed.

N.H., Jr.

* * *

CHATTELS "INTRINSICALLY" PERSONAL - GAS AND ELECTRIC FIXTURES - APARTMENT INSTALLATIONS:- "Certain chattels have such a determinate character as moveables that they remain personal property after their annexation to real estate, independently of any agreement between the owner of the chattels and the owner of the realty which so provides." (Madfes v. Beverly, 251 N.Y.12). Thus gas ranges are deemed to retain their intrinsic character as personalty when affixed so as to be severable without material injury, with the result that recording of a conditional sales contract is unnecessary for the validity of a retention of title in the conditional vendor (id).

This construction of the statute (P.P.L. §§65-67) left undecided the question as to just what chattels are embraced within this class so as to retain their character as personalty, although affixed to the realty (cf. note 73 A.L.R.772) and in this respect the recent case of Guardian Life v. Swanson (Ill. , 3 N.E.(2d) 324) has ruled on a question not authoritatively decided in this State. On foreclosure of a mortgage on an apartment house, petitioner intervened, demanding possession of twenty electric refrigerators installed by the mortgagor of the realty; petitioner claiming under a chattel mortgage executed by a subsequent owner at a later date, the refrigerators then being fully paid for. The installation had been made in order to meet the rental season, shortly after the negotiations for the original loan, at which time the mortgagor had expressed his willingness to install them as the mortgagee might require. No separate transfer by bill of sale was made to the purchaser of the realty.

The Illinois court found that electric refrigeration is economically essential to modern apartments, in that they are otherwise no readily rentable to occupants of the class for which they are designed. Accordingly it was held that the purpose of the installation was to increase permanently the value of the building for such occupation, and that they were intended to become a part of the realty. Such necessarily involved the conclusion that "such property, as refrigerators may, upon installation be classified as chattels personal or real, according to the intention." (Guardian v. Swanson, supra).

"Gas and electric fixtures, as ordinarily attached to a house or other building for use, are in an action between mortgagor (or suc

cessor, as in the instant case) and mortgagee held to be personal property." (McKeage v. Hanover, 81 N.Y.38). Technically, they are not permanent improvements to real property. (Wahle-Phillips v. Fitzgerald, 225 N.Y.137). In the case at bar, the refrigerators stood on their own legs, and were unattached to the building save by an electric cord plugged into a wall socket.

A chattel within the Madfes case "irrespective of agreement to that end is intrinsically personalty." (Madves v. Beverly, supra). However, that case was confined to holding gas ranges to be such, without attempting to enumerate the objects that would be subject to a similar holding. From this, it has been argued that the decision is limited to the particular subject matter and that it does not lay down a general rule as to fixtures, but merely recognizes an existing rule of property. (Lightolier v. DeMar (1st Dept. 1933), 237 A.D.432; cf. Peck v. Schenectady, 170 N.Y.298). The dissenting opinion in the Madfes case was based on the evidence of intent afforded by the fact of installation in an apartment, as opposed to a residence. This argument was dismissed by the prevailing opinion with the remark that the same conditions had obtained in Central Union Gas v. Browning (210 N.Y.10). While involving gas ranges installed in apartments, that case did not dwell on the subject of apartment installation, merely saying in passing that "ranges situated such as these lost none of their characteristics as personalty," and placed reliance in turn on Cosgrove v. Troescher (62 A.D. 123). These cases form part of a line of decisions holding gas ranges to be personalty as a matter of law, and the court in the Madfes case indicated they felt bound thereby.

However, the Cosgrove case held it to be a question of fact whether refrigerators in the same apartment were a part of the realty, depending on whether they were specially manufactured or constructed to fit the alcoves in which they were placed; matched the rest of the room, etc. Other cases have developed this, the result turning on whether the chattel was especially designed or manufactured for the particular use (Wahle-Phillips v. 59th Co., 153 A.D. 17, af'd 214 N.Y.684), or were such as might have been obtained in the market (Caldwell v. Glazer, 138 A.D.684). But such circumstances are mere manifestations of intent, differing only in degree from the bare fact of installation in an apartment, according to a common design or decorative scheme. Earlier cases have held the latter feature sufficient (Newman v. Montrose, 92 Misc. 182), and it is not settled whether such have been overruled by the Madfes case. (Kelvinator v. Byro Realty, 136 Misc.720, af'd 233 A.D. (1st Dept. 1931) 653, pro; Lightolier v. DeMar, supra, contra).

No quarrel should be made with the Madfes case in principle, but it is submitted that the soundness of its application to the case at bar, would in the light of modern conditions, be questionable. Judicial notice has been taken of the fact that this class of chattels while technically not a permanent improvement, nevertheless often pass with the realty, and are unlike articles of furniture which are easily and customarily moved. (Wahle-Phillips v. Fitzgerald supra). This would indicate that gas and electric fixtures belong to that class of chattels which are indeterminate in their nature, a situation whose validity was admitted in the Madfes case (cf. Mohler v. Brasum, 249 N.Y.224). Recognition of this fact would allow the Madfes case to be considered as laying down the general rule for chattels more properly comprising the class defined, e.g., ordinary

furniture (cf. n. 88 A.L.R.1318) and yet follow a rule of property in regard to gas ranges, which would then constitute an exception only to the rule suggested for chattels of a similar nature, viz. gas and electric fixtures, in which, if followed, intent would control.

A. J. O'C.

* * *

NEGLIGENCE - AUTOMOBILES - CERTIFICATE OF REGISTRATION AS PROOF OF OWNERSHIP:- If its principle is to be literally and rigorously applied to all actions in which the point is involved, the case of Shuba v. Greendonner (271 N.Y.189) will mark a new and somewhat radical departure from the settled rule of evidence applicable to the establishment of the ownership of the car by the defendant in automobile negligence cases. The action was to recover damages resulting from the negligent operation of an automobile owned by the defendant and being operated by his son. The car had been registered in the name of the defendant in the State of Connecticutt. Upon the trial defendant was allowed to prove that the car in fact belonged to the son. Presumably following the decision in Ferris v. Sterling (214 N.Y.249), the trial court charged the jury that proof that the registration was issued in defendant's name was prima facie proof that he owned the car, but subject to rebuttal. On appeal it was held, that the submission to the jury of the question of ownership was error, upon the ground that one who has deliberately caused an automobile to be registered in his name as owner will not be permitted after it has been involved in an accident and caused injury, to deny the truth of that statement.

Of course the plaintiff had to prove ownership by the defendant in order to charge him with liability (Page v. Hirsch, 207 A.D. 733; Bennett v. Nazzaro, 237 A.D.866), and the certificate of registration was competent evidence for that purpose. (Trombley v. Stevens-Duryea Co., 206 Mass.516). However, the general trend of authority is to the effect that such certificate is only prima facie evidence of ownership, and that defendant may destroy the presumption by presenting evidence to show that the car does not in fact belong to him. This had been previously so held in Ferris v. Sterling (supra). This was also a negligence action in which the car was shown to have been registered in the name of the defendant. Evidence to prove that the car actually belonged to the son, who was driving at the time of the accident, was excluded, and for this reason a judgment for plaintiff was reversed. The Court there stated that the license of the car, coupled with evidence that defendant held the license, was prima facie proof that he was the owner, but that defendant could rebut the presumption. (See also McCann v. Davison, 145 A.D.522; Stambler v. Walsh. 219 A.D.732 (mem); Universal Credit Co. v. Knights, 261 Supp.252). The rule as here announced also obtains in other jurisdictions (Patterson v. Millican, (Ala.), 66 So. 914; Farrelly v. Heuacker (Fla.), 159 So.24; Hewitt v. Fleming, (So. Carolina), 173 So.808; Kruse v. Wiegand (Wis.), 235 N.W.426; Chouinard v. Woolridge (Conn.), 102 Conn.66; 1-2 Huddy's Cyc. of Automobile Law (9th) 393), and it has been directly held that such certificate is not conclusive proof of ownership (Meskiman v. Adams, 83 Ind.44; 149 N.E.93).

There is undoubtedly a distinction in fact between the two cases which would seem to justify the application of different rules.

One of the important objects of registration of motor vehicles is to facilitate the identification of the owner and make it easier for the injured traveller to fasten responsibility for his injury and loss upon him who is by law liable therefor (Stroud v. Board of Water Commissioners, (90 Conn.412; People v. MacWilliams, 91 A.D.176). In Shuba v. Greendonner (supra) the registration in the name of the father was accomplished deliberately and knowingly, for the purpose of evading a statute of the State of Connecticutt which prescribed certain requirements in the case of registrations of a motor vehicle by a person under twenty-one years of age. To allow the defendant to deny ownership under such circumstances would, in the language of the opinion, be "against public policy and encourage fraudulent and illegal deceptions on the State in procuring the registration of automobiles in the names of persons who were not the owners thereof, directly in violation of the statute." (P.194). On the other hand, in Ferris v. Sterling (supra) it was claimed that the registration in the father's name was the result of a mistake. It appeared that the father's name was F. O. Sterling, and the son's O. F. Sterling, and in addition there was other testimony to substantiate the claim. Under such circumstances the reason for the application of the stringent rule of the Shuba case would not exist. The Court of Appeals made no direct attempt to distinguish the cases upon this ground. However, it was pointed out that in the Ferris case it was not necessary to go so far, whereas in the Shuba case the only question was "whether the trial court was in error under the facts in this case in submitting to the jury the question of ownership of the car."

Upon principle it would seem that the ruling in Ferris v. Sterling (supra) is the better one. Its reason lies in the fact that it is usually difficult to show ownership of an automobile and responsibility therefor when an accident is caused thereby. Such difficulty is obviated to a sufficient extent when the certificate of registration is allowed to create only prima facie the fact to be established, for certainly the defendant should not be held liable when he does not in fact own the car, and it is then up to him to go forward with the proof and to destroy the presumption if he can do so. The rule of Shuba v. Greendonner (supra), if followed strictly to its logical conclusion, would conclusively establish the fact of ownership upon the mere production of the certificate of registration and in situations such as that which arose in the Ferris case, create manifest injustice. "Courts are now inclined to abandon the arbitrary rules of evidence which formerly forbade inquiry into the real facts." 1 Jones Commentaries on Evidence (2d) §42.

C. D. W.

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PRACTICE NOTES:- Four cases of procedural significance which have arisen recently are Klin v. New York Rapid Transit (271 N.Y.376); Coleman v. American-Hawaii-S.S.Co., 160 Misc.211); Dickler v. Nat'l City Bank (160 Misc.317); White v. White (246 A.D.879).

By amendment effective September, 1932, the period of statutory limitation in an action to recover real property or the possession thereof was reduced from twenty years to fifteen. (C.P.A.§§34-37). In Klin v. Rapid Transit (supra) it was held that the period for

the acquisition of incorporeal hereditaments by prescription must be deemed to be changed in accordance with the recent change in the Statute of Limitations. The court treated the doctrine of prescription as the application to incorporeal rights of the statutory rule obtaining in the case of adverse possession, within the strict analogy between the two rules. Such analogy does exist, and a uniform rule has prevailed hitherto, in the case of corporeal rights, by virtue of statute, and in the case of incorporeal rights, by the common law. (Lewis v. N.Y.& H.R.R., 162 N.Y.202, 223). In the instant case the court merely refused to interpret the legislative silence as indicative of a purpose of having the court follow the analogy of a period of limitation that was no longer the law. In other titles of the law, the court has not hesitated to change a rule originally adopted to conform to a statute, and thus secure uniformity, where the statute itself had been changed. (Agar v. Orda, 264 N.Y.248).

A purely procedural point arose in Coleman v. Am. S. S. Co., (supra), which involved a cause of action against a common carrier, where the bill of lading contained a provision limiting the time, in which the action might be commenced, to four months. The complaint was dismissed on motion with affidavits showing that the "cause of action did not accrue within the time limited by law for the commencement of an action thereon." (Rules of Cicil Practice 107 subd. 6). It was held the motion should have been denied, as the period of limitation was fixed by contract, and by §10 C.P.A. situations where the parties have by contract assumed a shorter limitationthan that prescribed by law, are excepted from the operation of the statute. Independently of such provision, it should be noted that while a period limited by law is absolute, that limited by contract, in this State, depends for its validity on its reasonableness, which must be determined in the light of the facts in each case, a question which should be decided on the trial.

In Dickler v. Nat'l City Bank (supra) defendant moved for an order directing service of an amended complaint, on the ground of improper joinder of causes of action (Rules of Civil Practice, 102), consisting of a cause of action for damages for fraud in inducing the purchase of bonds, and one to rescind the purchase. It was held that §258 C.P.A., under which plaintiff may now join causes of action subject to the power of the court in its discretion to direct a severance whenever the interests of justice require (Cf. L.1935 ch. 339) does not supersede Rule 102, nor permit the joinder of "mutually exclusive" causes of action. Granted that the remedies are inconsistent and that the election of one of them is a waiver of the other (Merry Realty v. Shamokin, 230 N.Y.316, 323) the fact remains that there was in this case no election, at least by the pleadings, which were framed on both theories. Under §258 prior to the amendment (supra), causes of action must have been consistent to be joined, and this has been apparently revived by the court, at least where inconsistent remedies arising from the same right are concerned, although the rule may be different where distinct but inconsistent rights are concerned. The case was not an exercise of the admitted discretion possessed by the court but a construction of the statute so as to limit that discretion, which is a step away from a liberalized practice.

In White v. White (supra) the court allowed consolidation under §96-a C.P.A. of separate actions brought by husband and wife re-

spectively, the former for an annulment on the ground of a concealment of an epileptic condition by the wife at the time of marriage, and the latter for separation for cruel and inhuman treatment. Prior to last year's amendment of §266 C.P.A., a counterclaim for separation was not allowed in an action for annulment (Sorenson v. Sorenson, 122 Misc.196, 202, af'd 229 A.D.344) the decision being based on the provisions for matrimonial actions. It was thought that the restriction survived the liberalization of §266, because it rested on grounds independent of the statute, yet the effect of the consolidation is the accomplishment of the result forbidden by the Sorenson case, the court deeming the actions to arise out of the same set of facts and to be without prejudice to any substantial rights (Cf. §96-a).

A.J.O'C.

* * *

DECEDENT ESTATE LAW - THE RIGHT OF A SPOUSE TO ELECT:- Sections 18 and 83 of the Decedent Estate Law were enacted in 1929 as substitutes for the previously existing laws concerning dower and curtesy which were simultaneously repealed subject to certain concessions.

Section 83 established the rights of the surviving spouse in the real and personal property of the deceased spouse where he died intestate. The surviving spouse is entitled to one-third of the estate if there are children surviving the deceased; $5,000 plus one-half if there are no children surviving but there is a surviving parent of the deceased; $10,000 plus one-half if there are no children or parents but certain specified collaterals, etc.

Section 18 was enacted at the same time as §83 and its provisions gave the surviving spouse the right of electing to take the share to which such spouse would have been entitled up to one-half of the estate if the defunct spouse had died intestate as against a different provision in the will.

In the recent case of Bodner v. Feit (247 A.D.119), the Appellate Division determined that the right of the surviving spouse to elect to take his intestate share of the estate of the deceased spouse exists, to a certain extent, at least, in an inchoate state.

In the instant case, Esther Bodner married on March 26, 1933. Her husband died on July 11, 1934. Prior to his death, and on April 3, 1934, the husband had established certain irrevocable trusts in which he was named trustee and life tenant and in which his children born of a prior marriage were named remaindermen. The plaintiff, Esther Bodner, alleged that these trusts were established as the result of a conspiracy between her husband and his children to defeat her right of election under §18 of the Decedent Estate Law.

In the opinion of the court the complaint raised the question whether an owner of property, in order to defeat the right of the surviving spouse, may, in his lifetime, make such a tranfer of his property that he will be able to control and receive the benefit of his property during his life and yet prevent the right of his spouse from accruing at his death.

The majority opinion contended that §§18 and 83 established in

place of dower and curtesy have given certain rights in the property of the deceased. "These rights are substantial and are intended to enlarge rather than restrict the rights of one spouse in the property of another." The court conceded that under the statute husbands and wives have the utmost freedom of control over their respective property and may transfer it as they will in normal course during their lives. "But they may not, however, strip themselves of their property for the sole purpose of depriving those, whom the statute intended to protect, of the right to inherit. Such an attempt is mala fide and a fraud upon the law and as a consequence, the husband, so far as the rights of the widow are concerned, must be regarded at the time of his death, as the owner of the property in question."

In Rubin v. Myrub Realty Co. (244 A.D.541) the situation was substantially the same except that in the Rubin case the decedent had represented orally to the plaintiff prior to the marriage that, if she would marry him, she would share in the income derived from his realty and that upon his death she would receive one-third of his realty. Prior to the marriage and on March 1, 1932 he transferred his real property to the defendant in trust to pay the income to him during his life and upon his death to divide the property among his children.

The court here applied the same rule when it said "While a husband may at the present time dispose of his property without the consent of his wife, or prospective wife, he may not by a colorable subterfuge appear to have disposed of his property and yet retain the property for his own use and benefit the purpose of which is to remain seized of his property to the last drawn breath of life and yet upon the instant death effect a transfer of the property free from any claims of the surviving spouse."

It is apparent that these two cases together with LeStrange v. LeStrange (242 A.D.77) have established the rule.

It is to be noted, however, that there was a rather vigorous dissent by Mr. Justice Untermyer in Bodner v. Feit (supra), in which he said, "It does not appear that Nathan Bodner could not have created these trusts in normal course for the purpose of benefiting his children thereby. But it is contended that different consequences follow because the trusts are alleged to have been created for the purpose of depriving the plaintiff of her statutory interest in his estate. In other words, the validity of the transfer depends upon the motive which induced the disposition. But, if the act itself was legal, it is difficult to see why the motive for that act will change its legal effect.

"If the principle is once established, all transfers without consideration such as annuities, charitable gifts and family arrangements similar to this one willbe subject to attack upon the theory that the animating motive is not the enrichment of the beneficiary but the destruction of the interest of the surviving spouse. Further, even transfers made for a consideration will not be secured because it may be asserted that the consideration was inadequate and the sale a sham merely intended to defeat the rights of the spouse."

In answer to the contention that these rights were intended to

be in substitution for the right of curtesy and dower, Justice Untermyer replies, "Such a fact does not mean that when the Legislature abolished curtesy and dower, it conferred an estate both in the spouse's real and personal property of the same quality as formerly existed in real property alone. In fact, it is universally recognized that the Legislature intended nothing of the kind."

It would seem that Mr. Justice Untermyer correctly interpreted §18 when he said, "You may do as you please with your property while you live. You may spend it. You may waste it. You may give it away absolutely or cnnditionally. You may do this with motives of benevolence or for the malign purpose of defeating the expectations of your survivors. But whatever remains at your death and becomes an asset of your estate, will no longer be subject to unlimited disposition, but your spouse is entitled to receive the portion specified in the statute."

If, however, the courts wish to make an exception to the generally recognized interpretations in cases such as this one, it would seem that consistency may properly yield to justice if the exception is confined to situations where the deceased spouse has conveyed the remainder subject to a life estate in his favor to one who has paid no considerationand who has been in some way a party to the plan of defeating the interest of the surviving spouse.

T. J. C.

ANSWERS

1. (a) No. (Nat'l Life Ins.Co. v. Minch, 53 N.Y.144).
   (b) No, according to Hurley v. John Hancock Mut., 247 A.D.547.
   (c) Quare. (Hurley case, supra). Law Review p.23.

2. (a) Yes. (Mat. Aronowitz v. Aronowitz, 159 Misc.103).
   (b) No, according to Mat. Houg v. Houg, 159 Misc. 895.

3. (a) Yes, according to Minasian v. Aetna, 3 N.E.(2d) 17, ___ Mass.___.
   (b) No, according to Smith v. Metropolitan, 125 Misc.670.

4. (a) No. (Adkins v. Children's Hospital, 261 U.S.525).
   (b) No. (Morehead v. New York ex rel. Tipaldo, 297 U.S.___, 80 L.Ed.921. See Law Review p. 1.

5. (a) Yes. (People v. Doty, 175 N.Y.164).
   (b) Yes. (People v. Marino, 271 N.Y.317). Law Review, p.20.

6. (a) Yes. (People v. Miller, 271 N.Y.44).
   (b) Yes, according to State v. Danz, 140 Wash. 546.
   (c) No, according to People v. Shafer, 160 Misc.174.
   (d) No. (Yellowstone Kit v. State, 88 Ala.196). Law Review p.7.

7. (a) Yes, according to Mat. Burt, 160 Misc. 218).
   (b) No. (Id.)
   (c) Yes, according to Hodson v. Picker, 159 Misc.356. Law Review p. 13.